

FILED 09 SEP 01 11:31 USDC-ORP

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

SHAWN T. FOX,

Petitioner,

Civil No. 04-303-ST

v.

ORDER

BRIAN BELLEQUE,

Respondent.

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HAGGERTY, District Judge:

Magistrate Judge Stewart issued a Findings and Recommendation [108] recommending that the Petition for Writ of Habeas Corpus [2] should be denied, and a judgment should be entered dismissing this case with prejudice. Objections to the Findings and Recommendation were filed by petitioner. The matter was then referred to this court for review.

When a party objects to any portion of the Magistrate's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate's report. 28 U.S.C. § 636(b)(1)(B); *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981). Petitioner filed objections in a timely manner. The court has given

the file of this case a *de novo* review, and has also carefully evaluated the Magistrate's Findings and Recommendations and the Record of the case.

### **BACKGROUND**

Petitioner was convicted by a jury of two counts of Aggravated Murder, two counts of Murder with a Firearm, Robbery in the First Degree with a Firearm, Burglary in the First Degree with a Firearm, Unlawful Use of a Weapon, Felon in Possession of a Firearm, and Unauthorized Use of a Vehicle, and was sentenced by the trial court to two life terms without the possibility of parole, plus another ninety months, with all sentences running consecutively. Findings and Recommendation at 2 (citations omitted). After direct appeal and a petition for post-conviction relief, petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, asserting ineffective assistance of counsel by his trial counsel. Respondent opposed the petition, arguing that petitioner's claims were procedurally defaulted; the state findings against petitioner are entitled to deference under 28 U.S.C. § 2254(d) and (e)(2); and petitioner's claims lack merit.

### **OBJECTIONS**

Petitioner asserts a summary objection to the reasonableness of the Findings and Recommendation by referencing his prior briefing before the Magistrate Judge. Respondent relies upon prior briefing in refutation of the summary objection.

### **ANALYSIS**

The Findings and Recommendation first addressed the claims that petitioner referenced in his petition but opted not to argue further. The Findings and Recommendation concluded correctly that these claims were without merit.

Next, the Findings and Recommendation addressed petitioner's acknowledgment that his remaining claims are procedurally defaulted, but that the default should be excused because (1)

he is actually innocent of the crime of Aggravated Murder; (2) no state corrective process allowed him to challenge the consecutive nature of his true life sentences; and (3) he now challenges the imposition of consecutive life sentences on a newly recognized legal right which he could not have reasonably raised during direct review.

The Findings and Recommendation correctly reasoned that petitioner is unable to excuse his procedural default through a showing of factual innocence. *See* Findings and Recommendation at 7-8. Petitioner cannot show that no reasonable juror would convict him of Aggravated Murder, especially in light of the fact that he now offers nothing in support of his claim but the evidence adduced at trial and this evidence resulted in petitioner being unanimously convicted of two counts of Aggravated Murder. Similarly, petitioner's claim that he is actually innocent of his consecutive true life sentences for Aggravated Murder is without merit, as petitioner's challenge to his sentence amounts to a claim of legal insufficiency, not factual innocence. Findings and Recommendation at 8 (citations omitted).

The Findings and Recommendation also correctly concluded that petitioner's argument that there was no available state remedy to correct his illegal consecutive true life sentences for Aggravated Murder is without merit because petitioner was given the opportunity to present his due process claim during direct review, and challenged Oregon's interpretation of applicable statutes. "While he did not achieve the result he desired, he cannot assert that he lacked an available forum in which to present his claim." Findings and Recommendation at 11.

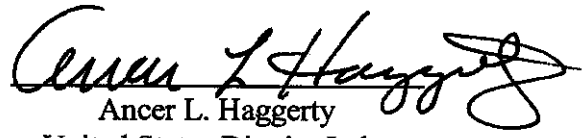
Finally, the Findings and Recommendation correctly rejected petitioner's challenge that suggested that there was a due process violation in the imposition of the consecutive true life sentences. *See* Findings and Recommendation at 11-12 (citations omitted).

**CONCLUSION**

Petitioner's objections have been considered and are overruled. The Findings and Recommendation [108] has been subjected to a *de novo* review and, for the reasons provided herein, is ADOPTED. The Petition for Writ of Habeas Corpus [2] is denied, and a judgment will be entered separately dismissing this case with prejudice.

IT IS SO ORDERED.

Dated this 31 day of August, 2009.

  
Ancer L. Haggerty  
United States District Judge